Date: 4-14-97
Case No. 95-STA-34

In the Matter of

THOMAS DUTKIEWICZ
Complainant

v.

CLEAN HARBORS ENVIRONMENTAL SERVICES, INC.
Respondent

Appearances:

Thomas Dutkiewicz, Pro Se
for Complainant

Peter Gish, Esq.
Jonathan R. Black, Esq.
for Respondent

RECOMMENDED DECISION AND ORDER

INTRODUCTION

This proceeding arises under the employee protection provision, Section 405, of the Surface Transportation Assistance Act of 1982, 49 U.S.C. § 31105 ("STAA"), and the applicable regulations at 29 C.F.R. Part 1978.

Complainant filed a timely STAA complaint against Clean Harbors Environmental Services Inc. ("Clean Harbors") on February 13, 1995 with the Boston, Massachusetts Office of the Occupational Safety and Health Administration ("OSHA"). Complainant was first employed by Clean Harbors on August 2, 1993. He was fired on August 19, 1994. He was reemployed and returned to work on October 28, 1994. On January 16, 1995, he was fired a second time. He contends that these terminations were in retaliation for his compliance with Department of Transportation ("DOT") regulations on packaging and transport of hazardous waste, in violation of the STAA. On May 31, 1995, after an investigation, his complaint was found to have no

merit by the OSHA regional administrator. Complainant then filed a timely appeal and request for hearing.

A hearing was held before the undersigned on July 30-August 2, 1996. Complainant presented the testimony of himself and his wife, Aimee. The employer presented the testimony of Susan Braverman, a clinical social worker employed by a Clean Harbors contractor, Crisis Management Group; Peter Ferrio, a sales representative ("account manager") at the Bristol, CT service center during complainant's employment there; Anthony P. Cellucci, Clean Harbors' transportation compliance manager; and Brian J. Monahan, director of transportation and logistics. The record consists of the transcript of proceedings ("TR"), Complainant's Exhibits ("CX") 1-53, Respondent's Exhibits ("RX") 1-16, and Administrative Law Judge's ("ALJX") 1. ALJX 1 consists of Clean Harbors' 1995 Annual Report, and five organization charts, submitted by letter of August 16, 1996.
Both parties filed briefs and proposed findings of fact and conclusions of law and responses thereto, which have been considered.

SUMMARY OF THE EVIDENCE

Clean Harbors is a national environmental services company based in Braintree, Massachusetts, providing, inter alia, hazardous waste management, including treatment, storage, recycling, transportation, and disposal of hazardous materials. (ALJX 1, Annual Report). It has 40 locations in 22 states, gross revenue of approximately $210 million per year, and 1500 employees. It is the fifth largest American company in the hazardous waste disposal industry. (TR 693).

Complainant was employed as a Class A Liquid Driver on August 2, 1993 at Clean Harbors, assigned to the New Britain, CT service center. Complainant was required to inventory, label, mark, secure, and haul hazardous waste from the customers who generated the waste ("generators") to Clean Harbors' disposal facilities, principally the facility at Bristol, CT. He regularly transported hazardous material such as PCBs, carcinogens, poisonous gases, and corrosives. (CX 1a, p. 3).

Thor Cheyne was the general manager of the New Britain, CT service center during complainant's employment. With the exception of the customer service account managers ("CSAMS") and the sales representatives, known as account managers, all the personnel at the center, including the drivers, field technicians, specialists, foremen, supervisors, technicians, and drivers, reported to Cheyne. (TR 688, 692, CX 13-14). Complainant also had a coordinator who dispatched him to the customers. His first coordinator was Dave Mills. (TR 88). By March 1994, Chris Mullen had become his new coordinator. (TR 111).

The CSAMs and account managers at the New Britain Service Center reported to Howard Ray, the district sales manager in Albany, New York. (TR 683-684). The account managers worked on the outside, making sales calls, and giving customers quotes for hauling and disposal services, referred to as pickups. (TR 607). When customers called to order a pick

up, the CSAMs took over. They had primary contact with the customer after the account managers had gotten the customers. The CSAMs took orders over the phone or by fax. (TR 608). They generated paperwork such as manifests and labels, negotiated a pickup date with the customer, and arranged for drivers to be dispatched with pick up sheets to perform the pickup. (TR 608). During complainant's employment, the account managers at the New Britain service center were Tony Albini, Peter Doyle and Peter Ferrio. The CSAMs were Dave Pannuto, Dave Roland, and John Shomsky. (CX 1a, pp. 12-13).

Complainant applied for employment as a driver with Clean Harbors on June 28, 1993. (RX 1a). He had prior experience as a truck driver, including transporting hazardous materials. (RX 1b). He was originally interviewed by general manager Thor Cheyne for a driver position at the beginning of July, 1993. (TR 13). From August 2 to August 6, 1993, he received 40 hours of training at Clean Harbors' corporate office in Braintree, MA. Anthony Cellucci, head of Clean Harbors compliance department, was one of the trainers. The training included instruction in substance abuse, emergency response procedures, DOT requirements, and manifesting. (RX 2e). During the training, complainant was given a volume entitled the Driver's Guide to Hazardous Materials (CX 44), published by the American Trucking Associations, Inc., a portion of which is excerpted at CX 27. He had previously received similar training in his prior positions as a truck driver. (TR 13, 346-351). He started to drive for the company on August 9, 1993. (TR 13).

According to company policy as stated in CX 27 and 44, a driver is required to comply with sections of 49 C.F.R. pertaining to hazardous material handling in order to transport hazardous waste. Failure to do so can result in fines or jail sentences. (CX 27, p. 2). The driver is responsible to ensure that the shipment is acceptable for transport pursuant to 49 C.F.R. § § 171.2, 177.801. (CX 27, p. 1). Every hazardous material shipment must be accompanied by a shipping paper such as a manifest which properly describes the material. The shipper is responsible for preparing the manifest and certifying that the shipment is properly prepared for transport, but the driver is responsible to check the manifest for errors and for missing information. 49 C.F.R. § 172.200 et seq. (CX 27, p. 2). The shipper must label each package, freight container and transport vehicle as required by the DOT regulations, but the driver is required to recognize and identify package markings to determine regulatory compliance and to determine package contents for proper handling, loading, and, if necessary, emergency action. 49 C.F.R. § 172.300 et seq. (CX 27, p. 2). The labeling of hazardous materials is the shipper's responsibility, but the driver must be able to recognize labels and cross reference them to the manifest to be sure the shipment is properly prepared. Labels are color coded to identify the hazardous class they represent, and must be of a certain size and color. Labels are forbidden to be displayed on packages which do not contain hazardous materials of the hazard class indicated. 49 C.F.R. § § 172.400, 172.101. (CX 27, p. 2). The driver may not accept damaged packages, leakers, incompatible freight (such as cyanide and acid) or improperly prepared shipments. (CX 27, p. 4a; TR 368-369).

Complainant testified that, shortly after his employment began, the company started imposing extra charges on the customers for excess demurrage time spent on site by drivers

correcting mistakes made by the generators in preparation for transport of drums containing hazardous waste. (TR 85). Demurrage is the delay time on site to allow customers to complete paperwork, load the drums, and have the customer sign the manifest so that the truck can legally leave the site. According to Peter Ferrio, the cost estimate given to the customer included one or two hours free demurrage. (TR 611). A few of the customers in turn then began complaining about complainant's spending extra time on site, in particular Enthone, Allied Signal, Remington, and Pitney Bowes, because they were unhappy about the extra charges. (TR 86). Complainant testified that these were the customers who had the most problems with their drums. (See, e.g. TR 117). Thor Cheyne, Peter Ferrio, Peter Doyle, John Shomsky and David Rowland began to press complainant not to take the time to fix hazardous waste drums for transport. Complainant told them that they were, in effect, asking him to break the law and that he could not do so. (TR 89, 286-287).

Complainant then designed a form to document what he had to do to prepare hazardous waste drums for transportation on the generators' premises. He testified that, after completing the forms for the customers, he gave copies to the CSAMs, account managers, and Thor Cheyne. (TR 91). He introduced into evidence several such forms completed between February and June 1994 for Danbury Hospital, Allied Signal (two), Carbo Labs, Yalesville Plating & Metals, AKZO Chemicals, New Britain General Hospital, Amgraph Packaging, Inc., Easco Aluminum Company, Textron, Inc., and EHS Engineering (two). These forms indicate that he found such problems on site as failure to label drums, waste on the outside of the drums, surface rust on lids, leaking drums, and missing bung caps. Complainant spent as much time on site as he believed was necessary to correct these problems.

Complainant explained to Thor Cheyne that if these problems were not corrected, liquid or vapors could spill onto him or into the truck, resulting in a fire or explosion on the highway, exposing himself, the public, the environment and emergency personnel to an unknown hazard or other Clean Harbors personnel to a poison, or inhalation hazard on re-entering the truck at the disposal facility. (CX 1a, p. 7).

On February 5, 1994, complainant was given his six month review by Thor Cheyne. (CX 7a)[1]. His salary was raised from $12.15 to $14.30 per hour, an increase of 17.7%. He was rated over all as "meets expectations," described as "performance [which] consistently meets the standards and requirements of the position and work is of high quality." Under Section I, Quantity, he was rated as "meets expectations" on productivity, effective use of time, and ability to meet deadlines. Cheyne commented that Tom had been a high performer for the service center. In Section II, Quality, complainant was rated as "meets expectations" in dependability, follow up and judgment, and exceeds expectations in thoroughness. Cheyne commented that complainant's thoroughness had raised questions with customers as to his productivity, but stated that "Tom should continue his quality in that it is quality that customers are buying from CHES." In Section III, Work Habits, he was rated as "meets expectations" on initiative, organization of work and professionalism, "exceeds expectations" on job interest and attitude,

[1] Complainant's handwritten comments on his performance reviews have been ignored.

and "needs improvement" on ability to work well with others and cooperation. In Section IV, Safety and Health, he was rated as "meets expectations" on demonstrating knowledge of safety procedures and observing company and federal regulations. In Section V, Skill and Job Knowledge, he was rated as "meets expectations" on broad knowledge of the field and detailed knowledge of the job, and in Section VI, Attendance and Punctuality, as "meets expectations." Cheyne's general comment was "knowledgeable, flexible and very willing to follow instructions."

On April 18, 1994, Thor Cheyne wrote complainant a note stating the following:

> Tom,
>
> I would like you to get in and out of Allied w/o demurrage or extra time regardless of condition of drums.
>
> Thor,
>
> T.T. me if you have any questions.

This note was affixed to an April 4, 1994 credit request memorandum prepared by John Shomsky, asking for a quarter hour credit on an invoice to Allied Signal. According to the memorandum, this was the customer's third complaint that complainant took too much time to make pick ups, and other drivers had picked up the same number of drums -- 25 -- in 1 hour or less. (CX 11a). John Chomsky did not testify at the trial.

Complainant testified that he felt Thor's instruction was illegal, to ask an employee to haul drums regardless of condition. (TR 122). "He basically told me to disregard everything I'm supposed to do, to transport a drum that would hurt myself, hurt my wife and family in case I was exposed to something, expose fellow employees because I would bring this truck into facilities, possibly the public and the environment or emergency response personnel because if its leaking." (TR 124). Complainant then sent a copy of the note to Dave Cyr, the operations manager and Brian Peterson, the supervisor of the Bristol disposal facility. (TR 128, CX 1(b) p. 4).

Peter Ferrio testified that the account managers at the New Britain service center such as himself prospected for business by placing sales calls, and presenting information on the company, including reference letters. They secured waste samples from customers to supply a quote on their waste streams. The sampling procedure was done by himself and/or a chemist. They completed profile sheets chemically identifying waste in detail with such items as DOT descriptions, EPA codes, and hazard class categories. The sample and completed profile forms were then forwarded to their analytic laboratories in Braintree and Bedford, MA where chemical tests and a regulatory review of the paperwork were performed. (TR 604-605). Once the sample was analyzed and the profile approved, a PAR -- profile approval report -- was generated to the customer listing the DOT information for the waste stream. A quote was then given. The customer then called to identify the profile number and the number of containers for shipment. (TR 607-608). The CSAM then took the order and generated manifests and labels.

The driver was then dispatched to the customer site with a pickup sheet to perform the pickup. (TR 608).

Ferrio testified that customers rarely complained about any drivers except complainant. He received the first complaints in November or December 1993. There were concerns about paperwork being changed on site arbitrarily. He testified that the extensive review process completed prior to the pickup by himself, by the CSAM, by the central profile group, and by the entire compliance organization to prepare the shipment was preempted by complainant on site. (TR 612-613). He stated that he told complainant several times about the customer complaints, and that complainant's response was always that the customers were wrong and he was right, that the customers were breaking the law and it was his job to have a perfect shipment. (TR 621). He also testified that there was an operations meeting every Friday morning at the New Britain Service Center with the dispatchers, CSAMs, sales representatives, field supervisors and Thor Cheyne, and that complainant frequently came up as a potential liability. (TR 624). Ferrio testified that he had never received copies of complainant's drum inspection forms. (TR 629).

Ferrio gave examples of incidents with complainants at Phillips Electronics Airpax Division, Beaver Brook Circuits, Dresser Industries, Enthone, Hubble Corporation, Kaman Airspace, and King Industries. (TR 613-627). These examples were all based on information relayed to him by customers on site, such as Fenton Macomber at Enthone. (TR 618-619). None of the customers who allegedly made the complaints to Ferrio testified at the hearing.

On April 29, 1994, Ferrio sent an interoffice memorandum to Thor Cheyne and John Shomsky with a complaint based on information relayed by the customer contact at Enthone, Fenton Macomber. (RX 5a). On September 16, 1994, at 6:07 p.m., Ferrio sent an interoffice memorandum to Thor Cheyne with a copy to Howard Ray and John Shomsky, stating that complainant had upset another customer, King Industries. He stated that the problems stemmed from Tom's behaviors; "poor customer relations, outright DOT violations, uncooperative and condescending attitude, inflexibility, taking too much time, etc. Tom is blackballed at many accounts, due to the irritation the customers have experienced during his pickups." He stated that he had repeatedly told Cheyne about these problems over many months, and that he wanted a resolution to the problem, since it repeatedly needed to be addressed, and "consum[ed] unnecessary good will and sales effort to keep the customers in the fold." Ferrio suggested that complainant either be replaced or reassigned to a job with minimal customer contact. (RX 5b). Later that same day, at 6:38 p.m., Ferrio sent another interoffice memorandum to Cheyne stating that he was "totally frustrated with Tom" and that, if Cheyne did not address the problem soon, he would go over Cheyne's head to Brian House. (RX 5c).

On cross examination, Ferrio admitted that he had received no written complaints from the customers about complainant or his performance. (TR 639). There were no written minutes of the Friday morning operations meetings in which complainant had been allegedly discussed as a potential liability. He also had no knowledge of any warnings given complainant by general manager Cheyne about customer complaints. (TR 640). Ferrio agreed that changes on a pre-approved manifest have to be approved and initialed by the customer before a shipment is loaded

for transport. (TR 658, 660). He had no manifests to prove that a customer had objected to any changes made by the complainant. (TR 658).

Ferrio had nothing to do with sending or packing waste and had never physically loaded a truck during his employ at Clean Harbors. He had voluntarily taken a training course called "Performance Oriented Packaging" dealing with a DOT directive supervising hazardous waste shipments. (TR 673-674). Although he had never personally transported hazardous waste, he had done load preparation, completed manifests, labeled drums, done waste analysis plans, set up sampling protocols, i.e. everything but physically driving the truck off site and signing the manifest as an approved license certified transporter. (TR 675).

Clean Harbors introduced a number of documents showing various errors that complainant had made during the course of his employment at the New Britain, CT service center. On September 17, 1993, Kent Bongarzone, a Clean Harbors corporate transportation compliance specialist, made an inspection of complainant's truck at the Braintree, MA facility. The inspection results are set forth on a form entitled driver/vehicle inspections. Several violations were found, including an uninspected 5 pound fire extinguisher, no reflective triangles, an incomplete spill bag missing extra cartridges and tyveck suits, and no spare batteries for flashlight. The form notes two other inspections at the Natick facility, including one driver with two violations and one driver with an excellent attitude and very well organized vehicle. (RX 4a). Complainant admitted that he mistakenly indicated on his reported chronology of events to the Wage-Hour investigator that he was the driver with an excellent attitude and very well organized vehicle. (CX 1b, p. 1; TR 428-429).

Complainant received a verbal warning from Thor Cheyne about his September 1993 log book, and a written warning about his October 1993 log book. (RX 4f). On November 29, 1993, Thor Cheyne suspended complainant for five days without pay. This suspension is set forth on a Clean Harbors "Employee Warning Notice" form. The reason stated was a log book falsification on September 17, 1993. Complainant asserted that this was an entry made in error, rather than a wilful log book falsification. (RX 4b).

Complainant had several "Form and manner" violations, i.e. log book errors, for January through March, 1994. These errors included missing or improper change in duty status location, a missing document number, and a missing trailer identification number. Similar errors were also listed for drivers Norman Foote, Greg Poitros, Ely Ernest, and Shane Shilosky. (RX 4c-4d).

On June 20, 1994, Cheyne suspended complainant for another 5 days without pay for transporting drums without load locks, and for double stacking drums. A photograph was attached to the Warning Notice. (RX 4g). The form indicated that complainant had received a prior verbal warning for this same offense for an incident at Enthone. It indicates that a third incident would mandate immediate termination if it were to occur within one year. Complainant signed the form, but did not include any comments. Complainant testified that he did not do so because Cheyne did not give him the opportunity to do so. (TR 450).

On September 1, 1994, Cheyne gave complainant his second six month review. (CX 7b). Cheyne again rated him overall as "meets expectations," and raised his pay from $14.30 to $14.73. His rating on productivity dropped from "meets expectations" to "needs improvement," and his rating on dependability and follow-up increased from "meets expectations" to "exceeds expectations." His rating on ability to work well with others and cooperation remained as "needs improvement." Cheyne's one comment was that complainant's judgment was "usually good, but Tom makes significant judgment errors once per three months."

Cheyne fired complainant on September 19, 1994. According to complainant, the only reason Cheyne gave for his discharge was that customers were complaining because he was wasting time fixing drums and Clean Harbors could not have him in front of customers anymore. (TR 169). Cheyne did not testify at the hearing before me. Complainant testified, and I find, that nothing in his personnel file indicates any disciplinary actions, either verbal or in writing, or time off for customer complaints. (TR 211). As Clean Harbors points out (Brief, p. 2), complainant's firing followed Peter Ferrio's two interoffice memoranda complaining about him on September 16, 1994.

Complainant then telephoned Steve Pozner, the Vice President for compliance and health and safety at the Braintree corporate office.[2] He also wrote Pozner a letter dated September 20, 1994, complaining about pressure from the sales representatives and Thor Cheyne to load drums which were not properly marked and labeled or were incompatible. (CX 3a). He was invited to a meeting at the Braintree corporate office on September 21, 1994. Steve Pozner, Brian House, vice president for field services, and Kate Creagh, Director of Human Resources, were present. According to complainant, Steve Pozner admitted that the company was trying to have its other drivers deal with compliance as he was doing. They told him they would investigate the situation and get back to him. (TR 172-173).

On September 26, 1994, Kate Creagh telephoned him and told him that the company was upholding the decision to terminate him. (TR 173). Complainant's wife, Aimee Dutkiewicz, then telephoned Tony Cellucci, director of transportation compliance, and threatened to go to the press and to complain to the federal government if the decision were not reversed. (TR 174, 520-521). Vice President Thomas Hemans, Kate Creagh, Tony Cellucci and Brian House then called him back.
(TR 174). Hemans said that he would conduct a further review of the matter. On September 27, 1994, Kate Creagh telephoned complainant, told him they had decided to investigate the matter further, and would be paying him for three weeks at the rate of 40 hours per week. (TR 175). On September 30, 1994, Creagh telephoned and asked him to travel to Crisis Management Group in Newton Upper Falls, MA for a meeting with Social Worker Susan Braverman. (TR 176). Creagh is no longer employed by the company.

[2]While Complainant refers to the corporate office as located at Braintree, MA, its mailing address is apparently Quincy, MA. (See CX 1a, p. 12).

Susan Braverman testified that Kate Creagh had telephoned and asked her to evaluate complainant regarding his termination, whether he might be a danger to other employees in the workplace, and the most productive way to deal with the situation. (TR 550-551). She asked Dr. Ronald Ebert, whom she described as a forensic psychologist and specialist in dangerousness assessment, to work with her and meet with the complainant. (TR 551). The interview took place on October 4, 1994. (TR 553).

On October 6, 1994, Braverman produced a report to Kate Creagh. Braverman attached to the report a copy of complainant's October 5, 1994 letter to her. (CX 16). Braverman did not send a copy to complainant. Complainant did not secure a copy of the report until after the Wage-Hour investigation began, and testified that he was unaware he was being evaluated for dangerousness. He noted that, if he had been aware, he would have included a response on this issue in his October 5, 1994 letter to Braverman. (TR 198).

Braverman testified that, before meeting with complainant, she interviewed several employees whose identity she refused to divulge. (TR 555-556). In her report, Braverman described complainant as a "capable and experienced driver" who is "conscientious in completing his documentation and performs much of his job well" but had "a lengthy history of problematic behavior that interferes with the performance of his job ... dat[ing] back to the first week of [his] employment." These behaviors included failure to load drums in a timely fashion, failure to use the proper "chain of command" in reporting concerns or difficulty, arguing with customers, and engaging in discussions with customers about the performance of work by Clean Harbors. She stated that the persons she had interviewed told her that they had discussed the problems with complainant on numerous occasions, and that he was warned verbally and then in writing that the behaviors had to stop. She conceded that she had not seen any documentation. (CX 16). She also refused to identify the persons she had interviewed. (TR 555-556).

Braverman concluded that complainant did not present a physical danger to anyone, and that she saw three options to deal with the situation. The first option was to uphold his termination based on his failure to perform his job in a satisfactory manner and to correct unsatisfactory behaviors as requested. The second option was to uphold his termination, acknowledge that it might have stemmed from an honest misunderstanding about his job, and provide him with a severance package. The third option was as follows:

> Mr. Dutkiewicz could be provided with one final opportunity to work for Clean Harbors, making use of the particular strengths he brings to his work. These strengths include meticulous attention to detail, extensive interest in and knowledge of compliance regulations, and ability to develop methods to solve problems. Among other skills, he has shown evidence of ability to develop effective and very usable forms for documenting work performance of different types. If this option is exercised, he should report to one person directly. He should work at a site other than the New Britain site, since his history there would not support his possible success. He should also be in a position that does not require customer contact. His job assignment should be very clearly defined and maintained and any feedback to him about his performance should be given to him in writing as well as verbally to ensure clarity. It should also be made clear to him that this is his last opportunity to succeed with the company.

On October 18, 1994, Kate Creagh wrote to complainant offering him the position of Over the Road Driver with the National Transportation Group, based at the disposal facility ("Connecticut Treatment Center" or "CTC") in Bristol, transporting waste to and from company facilities. She also stated the following:

> Tom, it is very important that I outline here your exact responsibilities in this assignment, your reporting relationship and the parameters within which we would expect you to operate to carry out your duties.
>
> You will report to Mr. John Caron, Transportation Coordinator. He will dispatch you, supervise you and he is the first person you should contact for any questions or concerns about your assignment or how you are to carry out your duties. If John Caron is unavailable, you should immediately contact Mr. Brian Monahan, Director of Logistics. Please refrain from contacting numerous other personnel until you have followed your chain of command.
>
> I have attached for your review the current performance appraisal that is used for all drivers. It clearly states the measurements against which all of our over the road drivers are evaluated. Please note the customer relations portion of the evaluation. Your customers in this position will be primarily plant personnel.

The letter contained a line stating: "I accept this offer of employment." Complainant signed the offer on October 19, 1994. (CX 21a).

On October 20, 1994, complainant went to the Bristol plant to meet with Brian Monahan. (TR 220). Monahan had started working for the company a few weeks previously as Director of Transportation and Logistics. Ten people reported to him directly including 4 day shift supervisors, managing 12 to 13 drivers apiece. (TR 784-785). He testified that he was informed by his manager Larry Huerter, vice president of transportation, that a decision had been made to bring complainant back to the organization. Huerter gave Monahan the report from Crisis Management, but not the contract complainant had signed with Kate Creagh on October 19, 1994 setting forth the conditions of his return. Monahan had no discussion with Kate Creagh about complainant's situation before complainant started working with the National Transportation Group. He did not see the contract with Kate Creagh until after firing complainant. (TR 785, 833-835).

On October 24, 1994, complainant met with Monahan, John Caron, and another supervisor, Bob Peter. (RX 8). Complainant testified that he knew he was going to be a watched person because he was told at the meeting that he was "on a short leash." (TR 219-220). Monahan testified that he documented the meeting in an interoffice memorandum dated October 26, 1994 to John Caron and Bob Peter with a copy to Larry Huerter. The memorandum confirmed that the intent was to keep complainant on a "short leash," that his work assignments would be issued by John Caron to whom he would directly report, and that any coaching or disciplinary actions taken would be administered by John Caron, documented, and kept on file. (RX 8; TR 786-787). Monahan felt that, at the meeting, complainant understood what was expected of him. (TR 789).

Monahan testified that he fired complainant because of three separate incidents, including a lengthy phone call to Vice President of Field Services Brian House, an unauthorized request for a telephone, and a contact with the Massachusetts Department of Environmental Protection. (TR 812-813). Brian House did not testify at the hearing, but filed a brief affidavit. (RX 10). According to the affidavit, complainant attempted to contact Brian House, the Vice President of Field Services, directly. These attempts included leaving a lengthy voice mail message for House on January 10, 1995, criticizing a new procedure recently initiated for use by the company's drivers (the waste information tracking system or WITS), and several calls to House's assistant Terri Shea. Complainant no longer reported to House's organization, either directly or indirectly. Complainant also telephoned Joseph Lentini, manager of computer installation, on January 9, 1995, to request a cellular phone. Lentini did not testify at the hearing but filed a brief affidavit. (RX 11). According to Monahan, complainant had not asked Caron about either item prior to making the contact. (TR 798). Caron did not testify at the hearing.

Monahan testified that, after these two incidents, he learned from Brian Smith that complainant had contacted the Massachusetts Department of Environmental Protection ("DEP") because he did not have a current vehicle identification card in the rental truck he was using for a load to Massachusetts. (See RX 12). According to Monahan, complainant telephoned John Caron but John had left for the day. Complainant then telephoned an unidentified 24-hour supervisor who told him to take a different truck. After a crew transition, complainant again telephoned and spoke to a second 24-hour supervisor, Paul Castellani, who also told him to take a different truck. According to Monahan, Castellani then called Smith who confirmed that complainant could not take the truck without the current vehicle identification card, but complainant insisted on complaining to the DEP anyway. Neither Brian Smith, nor the unidentified 24-hour supervisor, nor Paul Castellani, testified at the hearing.

After meeting with Kate Creagh and, the Clean Harbors vice president Thomas Hemans, Monahan and Caron drove down to the Bristol disposal facility to meet with complainant face-to-face to fire him. First they were told by David Cyr, the disposal facility operations manager, that he had received a telephone call from a local vendor stating that complainant had contacted him to set up a fuel purchasing account. This was not part of complainant's responsibilities. (TR 816). David Cyr did not testify at the hearing.

Complainant testified that all Monahan said to him was that "it was not working out and that we were just a bad match." He had received no prior warnings. (TR 250-251). Clean Harbors did not protest complainant's claim for unemployment insurance. (CX 10(d)).

Monahan testified that, in his opinion, complainant had violated the contract for re-employment with Clean Harbors (CX 21a) because he had not followed the chain of command by contacting either John Caron or himself before contacting other Clean Harbors managers such as Brian House. (TR 849-850). He admitted that he was unaware of contacts complainant had with John Caron when complainant did follow the chain of command. (TR 828).

Complainant requests back pay for the period from his initial termination of September 19, 1994 to his reinstatement of October 28, 1994, and for the period from his second discharge of January 16, 1995 to August 1, 1998, in the amount of $251,494.90; health insurance from February 16, 1995 to August 1, 1998; counseling in the amount of $35,100; one year of dislocated worker training in the amount of $25,000; $7,000 for moving costs; $2,525 for postage, copying, computer paper and telephone calls; attorney fees of $2800; and compensatory damages in the amount of $4,900,000. (CX 52). Complainant produced no documentation of the health, counseling, dislocated worker, estimated moving costs of $7,000, litigation costs, or attorney fee costs. The litigation costs represent an arbitrary figure. (TR 329). He testified that his actual moving expenses from Connecticut to Indiana were $1,800, but produced no documentation of that figure. (TR 327).

Complainant began work for Environmental Services of America in South Bend, Indiana, as a Class A liquid driver on June 1, 1995, at an hourly rate of $11.25, or $.33 per mile, with no chance of increases. (TR 308-309). He can earn up to $19 per hour, depending on the speed limit of the state in which he is traveling. (TR 325). He estimates his current average gross weekly wage is $600 per week. His estimates of his average weekly pay at Clean Harbors range between $1000 and $1224.58 per week. He had intended to stay at Clean Harbors until normal retirement age of 65. (TR 313-314). He testified that he has no reason to believe he could not return to work at Clean Harbors, because the personnel with whom he had difficulty, including Brian House, Thor Cheyne, Bruce Devanney and John Caron, are no longer there. (TR 314).

Complainant testified that he suffered great stress from the on-the-job pressure to transport illegal drums before his first discharge, and from his subsequent discharges, including the development of stomach pain and peptic ulcer symptoms. His treating physician, internist James Gallagher, reported on April 3, 1995 that he developed these symptoms beginning in Summer, 1994, which "were in part undoubtedly brought on by the multiple stressors he has been suffering and experiencing during the Summer and Fall of 1994. The difficulty he relates to me concerning work and the work environment played a large part in the onset of his symptoms and I am sure on the recurrence of his symptoms." (CX 28b). He had a family of five to feed and his wife was unable to work because of the poor health of his children. He was forced to go on welfare and had to move to Indiana because he was unable to find work elsewhere. He and his wife were not covered by health insurance from January 1995 to September 1995, and his marriage suffered. (TR 288-292, 319). Complainant's wife confirmed complainant's testimony about the increasing stress on her husband and his resulting development of stomach pain. She also testified as to the desperation she felt when she learned of her husband's discharge. (TR 513-515).

DISCUSSION

To prevail on a STAA whistleblower complaint, a complainant must establish that the respondent took adverse employment action against him because he engaged in an activity protected under Section 405. A complainant initially must show that it was likely that the adverse action was motivated by a protected activity. Roadway Exp., Inc. v. Brock, 830 F.2d

179, 181 n.6 (11th Cir. 1987); Guttman v. Passaic Valley Sewerage Comm'rs, 85-WPC-2 (Sec'y Mar. 13, 1992), slip op. at 9, aff'd sub nom Passaic Valley Sewerage Com'rs v. Dept. of Labor, 992 F.2d 474 (3d. Cir. 1993). The respondent may rebut such a showing by producing evidence that the adverse action was motivated by a legitimate, nondiscriminatory reason. The complainant then must prove that the proffered reason was not the true reason for the adverse action. St. Mary's Honor Center v. Hicks, 125 L. Ed. 2d 407, 416 (1993). Moyer v. Yellow Freight System, Inc., 89-STA-7 (Sec'y Oct. 21, 1993).

Complainant proved that adverse actions were taken against him by demonstrating that he was fired on two occasions. He must show additionally that his firings were motivated by protected activity under the STAA. A protected activity is established by proof that

> (A) the employee ... has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard or order, or has testified or will testify in such a proceeding; or
>
> (B) the employee refuses to operate a vehicle because--
> (I) the operation violates a regulation, standard or order of the United States related to commercial motor vehicle safety or health; or
> (II) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.

The employer argues that Section 405(a)(1)(A) is not at issue in this action since complainant has not alleged that he was terminated because he filed a complaint or began another proceeding against respondent related to a violation of commercial motor vehicle regulations, standards or orders, or because he had testified or was going to testify in such a proceeding. (Clean Harbors brief, p. 4, n. 2). Since complainant is a lay person and was not represented by counsel, I reject this contention, and consider independently whether complainant presented evidence that he did engage in such a protected activity.

Based on his credible testimony, I find that, prior to his first termination, he continually complained to his direct supervisor, Thor Cheyne, that he was being pressured by other Clean Harbors employees, namely the sales and service personnel, as well as Cheyne himself, to violate DOT regulations with respect to hazardous materials that Clean Harbors had contracted to transport. Complainant has presented evidence of these complaints through his own credible testimony. His contemporaneous drum inspection reports, which he testified he presented to Cheyne, substantiate his concern about this pressure. Since Cheyne did not testify at the hearing, complainant's evidence in this regard stands unrefuted.

Although Clean Harbors argues that complainant did not prove that these drum conditions in fact violated DOT regulations, complainant need only prove that he had a reasonable belief that there were such violations. See e.g. Minard v. Nerco Delamar Co., 92-SWD-1, slip op. at 20-22 (Sec'y Jan. 25, 1994)(opposition to an employer's actions which are reasonably believed to violate the statute is protected even if it is ultimately determined that a violation did not occur.) Complainant's knowledgeability about the DOT regulations is not seriously contested. Susan Braverman recommended rehire of complainant as an option in part

because of complainant's "extensive interest in and knowledge of compliance regulations." Thor Cheyne rated complainant as "meets expectations" on demonstrated knowledge of safety procedures and observance of company and federal regulations on both his February 5, 1994 and September 1, 1994 performance ratings. Accordingly, I find that complainant had a reasonable belief that there were violations of the DOT regulations relating to transport of hazardous waste.

With respect to refusal to operate a vehicle, complainant has presented evidence by his own testimony, supported by his contemporaneously prepared drum inspection forms, that he continuously refused to drive Clean Harbors vehicles containing hazardous materials that he believed violated DOT regulations. This is confirmed by the note from his supervisor, Thor Cheyne, dated April 18, 1994. Complainant had provided Cheyne with two drum inspection forms for Allied Signal, one for a pick up on February 22, 1994, and one for a pick up on March 17, 1994. These forms showed, inter alia, that Allied had failed to provide hazardous class labels, that there was waste on the side of the drums, indicating a possible leak, that a bolt was missing, and that a lid had waste on it. (CX 9b, 9e). Cheyne's note of April 18, 1994 ordered complainant to transport Allied's hazardous waste "regardless of condition of drums." Clean Harbors argues that the note should be interpreted as instructing complainant to complete his assigned duties within the prescribed time frame and leave behind drums which were non-conforming. (Clean Harbors brief p. 8). I find this interpretation too strained to credit. Rather, I find that, in fact, Cheyne ordered complainant to transport Allied's hazardous waste drums regardless of their condition, i.e. regardless of whether complainant could reasonably believe they were in violation of DOT hazardous material transport regulations and might pose a serious threat to his health or that of the public.

Adverse action was taken against complainant when he was discharged on September 19, 1994 and again on January 16, 1995. Thor Cheyne admitted to complainant that he was discharged on September 19, 1994 because of customer complaints. Based on the close proximity in time between Peter Ferrio's September 16, 1994 memos to Thor, and Thor's September 19, 1994 firing of complainant, I find that Cheyne fired complainant in response to Peter Ferrio's reports of continuing customer complaints about complainant. Thus I find that the other evidence introduced by the respondent as to errors made by complainant during his employment had nothing to do with his initial termination. Complainant's articulated internal complaints and continuing refusal to drive Clean Harbors trucks containing hazardous waste materials he deemed to be not prepared and packaged in conformance with DOT regulations led to the customer complainants which resulted in his termination.

Customer complaints are, of course, a legitimate non-discriminatory reason for firing an employee, since a business cannot survive without customers. I find, however, that this reason is pretextual and that the real reason for his discharge was complainant's protected activities. The only evidence as to the substance of the customer complaints was presented by Peter Ferrio, and was uniformly based on hearsay statements. A prime example of this type of evidence is the statement from Fenton Macomber to Peter Ferrio presented at p. 13 of Clean Harbors' brief ("... Mr. Macomber told me that Mr. Dutkiewicz took it upon himself to begin changing drum labels without Mr. Macomber's permission, that Mr. Dutkiewicz insisted on changing things that had

been reviewed and audited by our entire compliance people and him and his entire compliance people. He found the--Mr. Dutkiewicz' behavior to be irritating and condescending and also inaccurate. He was very upset by the transaction, in addition to all the time it took and at which point Mr. Dutkiewicz left the plant one and did not secure his load.")

The Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges, 29 C.F.R. Part 18, like the Federal Rules of Evidence on which they are based, bar hearsay statements as evidence except pursuant to certain exceptions. Hearsay is defined as a statement, other than one made by the declarant while testifying at the hearing, offered in evidence to prove the truth of the matter asserted. 29 C.F.R. §18.801(c). The hearsay statements reported by Ferrio at best indicate the customers' then existing mental, or emotional condition, pursuant to 29 C.F.R. §18.803(a)(3). They indicate that, for example, Macomber was upset by his dealings with complainant. They cannot, however, be taken as evidence that Macomber's irritation with complainant was based on a factor other than complainant's insistence on complying with DOT regulations. I note that none of the complaining customers testified at the hearing, so that complainant had no opportunity for cross examination and the undersigned had no opportunity to judge the credibility of the complaining customers. Thus I accept complainant's unrefuted testimony that his protected activities led to the customer complaints, which, I find, led to his discharge.

As to the second discharge, I find that it cannot be separated from the first discharge. First, the rehiring was not done in good faith, based on Kate Creagh's failure to even discuss the contract conditions for complainant's rehiring with Brian Monahan prior to his re-employment. Second, as complainant testified, and Brian Monahan agreed, he was on a "short leash." This is not the usual situation with respect to a new employee. Thus, all his actions were closely and suspiciously scrutinized. When fired, complainant was not told of the specific reasons for his termination, nor was he given any warning about these incidents prior to his termination.

According to Monahan's memorandum of planned utilization for complainant (RX 8), disciplinary actions were to be documented and kept on file. There is no evidence that this was done. The phone calls to Brian House about WITS and to Joseph Lentini about the cellular phone were not documented until February 13, 1996, i.e. until over a year after complainant's firing, and then only by affidavit. Thus, the complainant had no opportunity for cross-examination and the undersigned had no opportunity to judge the credibility of either Monahan or House. The affidavit of House contains hearsay on hearsay, since it claims that his assistant also took calls from complainant. The only documentation of the incident involving the Massachusetts DEP was Brian Smith's complaint that complainant had telephoned the agency. (RX 12). Monahan's testimony that complainant was told to take a different truck by two supervisors but still insisted on telephoning the agency to complain about the lack of a vehicle identification card was also unsupported, as neither supervisor testified and one was not even identified.

In conclusion, as to the first discharge, the credible testimony of the complainant that this discharge represented retaliation for his protected activities was countered only by the testimony

of a sales manager who relayed unsupported customer complaints and a threat to the complainant's supervisor which resulted in complainant's firing. The second discharge cannot be separated from the first discharge. Accordingly, I conclude that complainant has established a violation of the STAA.

REMEDY

Remedies available to prevailing STAA complainants include affirmative action to abate the violation, reinstatement to the former position with the same pay and terms and privileges of employment, compensatory damages including back pay, and reasonably incurred attorneys' fees and costs. 49 U.S.C. § 31105(b)(3). Although complainant's calculations include what is, in effect, front pay through 1998, reinstatement is the generally preferred remedy. Front pay is used as a substitute for reinstatement only when there is irreparable animosity between the parties. Nolan v. AC Express, 92-STA-37 (Sec'y Jan. 17, 1995). Based on complainant's testimony that he has no reason to believe that he cannot return to work at Clean Harbors, I find that reinstatement is an appropriate remedy, either to the New Britain, CT Service Center, or to the Bristol treatment center.

An award of back pay under the STAA is mandatory once a violation is established. Moravec v. HC&M Transportation Inc., 90-STA-44 (Sec'y Jan. 6, 1992). Back pay continues until the employer reinstates the complainant to his former position or makes him a bona fide offer of reinstatement. Polewsky v. B& L Lines, 90-STA-21 (Sec'y May 29, 1991). Uncertainties in calculating back pay are resolved against the discriminating party. Kovas v. Morin Transport, Inc., 92-STA-41 (Sec'y Oct. 1, 1993). Back pay awards are, at best, approximate. Clay v. Castle Coal & Oil Co., Inc., 90-STA-37 (Sec'y June 3, 1994). While back pay is reduced by interim earnings, it is not reduced by unemployment insurance benefits. See, e.g. Moravec v. HC & M Transportation, Inc., 90-STA-44 (Sec'y Jan. 6, 1992). Accordingly, I reject the employer's argument that complainant's calculations for compensation received from his new employer are flawed and that any back pay should be offset by unemployment insurance benefits.

Based on his testimony that his pay with Clean Harbors ranged from approximately $1000 to $1200 per week, I find that a fair estimate of lost weekly wages is an average of these figures, or $1,100 per week. Accordingly, from his final discharge by Clean Harbors on January 16, 1995, until he began his employment with Environmental Services of America on June 1, 1995, complainant is entitled to back pay of $1,100 per week. Thereafter, he is entitled to the $500 differential between his average weekly wage with his new employer of $600 per week and at Clean Harbors of $1,100 per week, for the period from his final termination on January 16, 1995 until reinstatement or a bona fide offer of reinstatement. Pre-judgment interest on back pay is calculated in accordance with 26 U.S.C. § 6621. Park v. McLean Transportation Services Inc.. 91-STA-47 (Sec'y June 15, 1992) .

Complainant is also entitled to compensatory damages for emotional distress. The ARB has approved such damages in STAA cases up to $50,000. Ass't Sec'y v. Bigham v. Guaranteed

Overnight Delivery, 95-STA-37 (ARB Sept. 5, 1996) citing, inter alia, Ruhlman v. Hankinson, 461 F. Supp. 145, 151 (W.D. Pa. 1978), aff'd, 605 F.2d 1195, 1197 (3d Cir. 1979), cert. denied, 445 U.S. 911 (1980) (evidence of emotional distress amounting to more than "some pressure and embarrassment" sufficient to sustain award of $50,000). This amount is, of course, substantially less than complainant's request for almost $5,000,000.

I find that, based on his unrefuted testimony and that of his wife, complainant suffered severe emotional distress amounting to more than "some pressure and embarrassment" as the proximate cause of the respondent's prohibited actions in this case and his resulting forced relocation, including concerns for his family's survival, and difficulties with his marriage. This emotional distress contributed to the development of his ongoing peptic ulcer disease. Accordingly, I find that an award of $30,000 for emotional distress is appropriate.

Since the other costs claimed by complainant are undocumented, they cannot be reimbursed. In order to fully abate the violation, however, it is appropriate to order cleansing of complainants' work record at Clean Harbors, and posting of a notice of the employer's STAA obligations.

RECOMMENDED ORDER

IT IS HEREBY RECOMMENDED that Respondent, Clean Harbors Environmental Services, Inc., be ordered to:

1. Reinstate complainant to his former position at either the New Britain, Connecticut or Bristol, Connecticut facility with the same pay and terms and privileges of employment;

2. Pay to complainant back pay of $1,100 per week from January 16, 1995 to June 1, 1995, and of $500 per week for the period thereafter until reinstatement with Clean Harbors or a bona fide offer of reinstatement, with appropriate interest calculated in accordance with 26 U.S.C. § 6621;

3. Pay to complainant $30,000 in compensatory damages;

4. Expunge any references to the adverse action against the complainant from all its files; and

5. Post notice of its STAA obligations at the New Britain and Bristol Connecticut facilities.

_____

EDITH BARNETT

Administrative Law Judge

Washington, D.C.
EB:bdw
(95sta34.do)

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for final decision to the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Ave., N.W., Washington, D.C. 20210. See 61 Fed. Reg. 19978 and 19982 (1996).